IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN McCUTCHEN,	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	
SUNOCO, INC., et al.	:	
Defendants.	:	**NO. 01-2788**

M E M O R A N D U M

Reed, S.J. **August 16, 2002**

Presently before the Court is the motion of defendants Sunoco, Inc., Mascot Petroleum Company, Inc., and Louis Maiellano (collectively, "Sunoco") for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (Document No. 17), the response of plaintiff John McCutchen ("McCutchen") (Document No. 20) and the reply thereto (Document No. 21).[1] For the reasons which follow, the motion will be granted.

I. Background [2]

Plaintiff is an African-American male who suffers from an eye condition known as keratoconus. McCutchen was hired in 1994 as a sales associate by Sunoco for its A-Plus convenience store at 18th Street and Market Street ("Market Street store") in Philadelphia, Pennsylvania. At the Market Street Store, plaintiff's responsibilities included stocking shelves, cleaning the store, trash removal, assisting in the food preparation for breakfast and lunch and sorting the supply shipments. When the Market Street store was closed in late 1997, plaintiff was assigned to work in two Sunoco A-Plus convenience stores: 22nd and Walnut Streets ("Walnut Street store"), and 23rd and Fairmount Streets ("Fairmount Street store"). Upon plaintiff's request, he was eventually assigned exclusively to the Walnut Street store. There he

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[1] The motion of defendants for leave to reply is granted pursuant to Local Rule of Civil Procedure 7.1(c).

[2] All facts are reviewed in the light most favorable to the non-moving party, as required on a motion for summary judgment. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993 (1962)).

performed essentially the same tasks as he did in the Market Street store, with the additional tasks of cleaning the gas pumps and the parking lots. (Id. at 76-77.) Plaintiff has received an annual raise ranging from $0.25 to $0.50 per hour every year of his employment. (Def. Exh. G.) Defendant Louis Maiellano was the area manager for several Sunoco stores in the Philadelphia area, including the Walnut Street store, from April 1997 until May 2000. (Maiellano Dep., Def. Exh. F at 17-19.) Plaintiff continues to be employed as a sales associate at the Walnut Street Store.

Plaintiff asserts that while working at the Walnut Street store, he was subjected to numerous degrading comments about his disability. Plaintiff also attested that Maiellano cut the number of hours that plaintiff worked per week and rearranged his schedule so as to interfere with his regularly scheduled eye doctor appointments. Plaintiff claims that he is unfairly prevented from operating the cash register or preparing foods as part of his job. Further, he claims that he has not been evaluated since his transfer to the Walnut Street store, and has not been promoted during his employment with Sunoco. Finally, in May and October 1999, plaintiff injured his right eye and consequently filed two workers' compensation claims. Plaintiff asserts that resolution of his May 1999 claim was unduly delayed and that he was harassed by a Sunoco insurance department employee during the process. Sunoco denied plaintiff's October 1999 workers' compensation claim. McCutchen claims that the foregoing actions constitute racial discrimination, disability discrimination and retaliation by defendants. Plaintiff filed this lawsuit against defendants under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., the Pennsylvania Human Relations Act, 43 Pa.C.S. § 951, et seq., the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq., as well as state tort law.[3]

[3] Because this case raises a federal question, jurisdiction is proper pursuant to 28 U.S.C. § 1331.

II. Standard

Federal Rule of Civil Procedure 56 (c) states that summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." For a dispute to be "genuine," the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party may not rely merely upon bare assertions, conclusory allegations, or suspicions. See Fireman's Ins. Co. v. Du Fresne, 676 F.2d 965, 969 (3d Cir. 1982).

III. Analysis

A. EEOC Charge

Defendants preliminarily move for summary judgment on the claims of racial discrimination, disparate impact and retaliation based on plaintiff's failure to exhaust his administrative remedies. Plaintiffs who assert claims under Title VII, the ADA and the PHRA must file charges with the EEOC and receive a right-to-sue letter before seeking relief from this Court. See Anjelino v. New York Times Co., 200 F.3d 73, 87 (3d Cir. 1999); Churchill v. Star Enters., 183 F.3d 184, 190 (3d Cir. 1999); Woodson v. Scott Paper Co., 109 F.3d 913, 925 (3d Cir. 1996). "[T]he parameters of the civil action in the district court are defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination," including new acts which occurred during the pendency of proceedings before the Commission. See Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1976), cert. denied, 429 U.S. 1041, 97 S. Ct. 741, 50 L. Ed. 2d 753 (1977), called into doubt on other grounds in Dillon v. Coles, 746 F.2d 998 (3d Cir. 1984).

McCutchen filed a charge with the EEOC on May 31, 2000. On the charge form, he checked off the boxes indicating that the cause of discrimination was based on (1) race and (2) disability, and wrote the following statement in the narrative section:

> I have a visual impairment which has gotten progressively worse. In April 1999, I sustained an injury to my right eye. On October 20, 1999, I was reinjured in that eye. My physician provided documentation to my employer that I was unable to work for approximately one month. Respondent denied my worker's compensation and took my sick time to pay for my time off. In addition, I have been subjected to verbal harassment about my disability. Mr. Louis Maiellano, Area Sales Representative told Ivan Ynnyk, Store Manager, that I am useless and can't see. Therefore, he did not want me working in his cashier booth. He also told him that if I can't see, I can smell and feel to clean hoses or gas pumps. No reasons were given for treating me in this harassing manner. I believe that I have been discriminated against because of my disability in violation of the Americans with Disabilities Act of 1990l as amended.

(Exh. O to Def. Mem. in Support of Motion at 1.) The factual allegations concern only discrimination in defendants' denial of the workers' compensation claim and harassment by Maiellano based on plaintiff's disability. Accordingly, defendants argue that plaintiff's remaining claims regarding racial discrimination, as well as his claims regarding disparate impact and retaliation are barred.

I find that where the EEOC charge is bereft of any allusion to allegations of racial discrimination, merely checking off the box of "race" on the EEOC charge is insufficient to exhaust it as a claim. See e.g. Allen v. St. Cabrini Nursing Home, Inc., 00-8558, 2001 WL 286788, at ** 3-4 (S.D.N.Y. March 9, 2001) (citing Butts v. New York Dep't of Hous. Preservation & Dev., 990 F.2d 1397 (2d Cir. 1993)) (courts cannot permit "vague, general allegations, quite incapable of inviting a meaningful EEOC response, to define the scope of the EEOC investigation."); Mohan v. AT&T, 97-7067, 1999 U.S. Dist. LEXIS 10609, at **30-32 (N.D. Ill. June 30, 1999). Outside of the checked "race" box, the EEOC charge clearly lacks any reference to discrimination against plaintiff based on race or retaliation. Further, I find that an EEOC investigation of plaintiff's charge as filed would not reasonably have encompassed a claim for racial discrimination or retaliation.

McCutchen contends that contemporaneously with his discrimination charge, he submitted a document dated May 1, 2000, entitled "Concerned Employees of Sunoco Against the Discrimination of Minorities and Disabled Persons in the Workplace" ("Concerned Employees Document") to the EEOC. He argues that the factual allegations in the Concerned Employees Document concern both disability and racial discrimination. The document is unsigned and unverified, but bears a stamp indicating its receipt by the EEOC on May 9, 2000. Plaintiff cites no case, statute or regulation that would support the construction of a document filed prior to filing a discrimination charge as grounds to satisfy the exhaustion requirement. Nevertheless, even if filing this document was sufficient to provide notice to the EEOC so as to exhaust the claims asserted, for the reasons that follow, plaintiff still fails to establish a genuine issue of material fact with regard to the claims of racial discrimination, disparate impact and retaliation so as to survive summary judgment.

B. Title VII and PHRA claims

I note at the outset that employer liability under the PHRA follows the standards set out for employer liability under Title VII. See Knabe v. Boury Corp., 114 F.3d 407, 410 n.5 (3d Cir. 1997). Thus, I will analyze McCutchen's claims only under Title VII below; however, my analysis and conclusions are equally applicable to his claims of discrimination in violation of the PHRA.

To survive summary judgment, the plaintiff must first prove by a preponderance of the evidence that a *prima facie* case of discrimination exists. See Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000); Stanziale v. Jargowsky, 200 F.3d 101, 105 (3d Cir. 2000). To establish a *prima facie* case, McCutchen must show that (1) he is in a protected class, (2) is qualified for the position, (3) suffered an adverse employment action, (4) under circumstances that give rise to an inference of unlawful discrimination. See Jones v. School Dist., 198 F.3d 403, 410-12 (3d Cir. 1999). There is no rigid formulation of a *prima facie* case, and the requirement may vary with "'differing factual

situations.'" Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 938 (3d Cir. 1997) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)). The *prima facie* case requires "only 'evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion.'" See Pivirotto v. Innovative Sys., 191 F.3d 344, 356 (3d Cir. 1999) (quoting O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312, 116 S. Ct. 1307, 1310, 134 L. Ed. 2d 433 (1996)). Nevertheless, the plaintiff must ultimately prove by a preponderance of the evidence that a *prima facie* case of discrimination exists. See Bullock v. Children's Hosp., 71 F. Supp. 2d 482, 490 (E.D. Pa. 1999). Demonstrating only a mere possibility of discrimination will not suffice. See id.

After the plaintiff has proven a *prima facie* case, the burden of going forward shifts to the defendant to produce a legitimate, nondiscriminatory reason for the adverse employment action.. See Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 522 (3d Cir. 1992). After a legitimate, nondiscriminatory reason is provided, the burden of going forward shifts back to the plaintiff to prove that the proffered reason is a pretext for discrimination. See McDonnell Douglas, 411 U.S. at 802; Ezold 983 F.2d at 522.

1. *Racially Hostile Work Environment Claim*

Hostile work environment harassment is actionable under Title VII and occurs when "the conduct in question [is] severe and pervasive enough to create an 'objectively hostile or abusive work environment – an environment that a reasonable person would find hostile – and an environment the victim-employee subjectively perceives as abusive or hostile.'" Weston v. Pennsylvania, 251 F.3d 420, 426 (3d Cir. 2001) (quoting Harris v. Forklift Sys., 510 U.S. 17, 21-22, 114 S. Ct. 367, 370-71, 126 L. Ed. 2d 295 (1993)). The following factors guide this Court in determining whether such a claim has been stated: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance." Id. (quoting Harris,

510 U.S. at 23).

A plaintiff cannot rely upon casual, isolated, or sporadic incidents to support her claim of hostile work environment harassment. See Andrews v. Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990); Harris, 510 U.S. at 20. While it is possible for a single action to constitute a claim for hostile work environment harassment if the act is "of such a nature and occurs in such circumstances that it may reasonably be said to characterize the atmosphere in which a plaintiff must work," generally a plaintiff must show that she was subjected to "repeated if not persistent acts of harassment." Bedford v. Southeastern Pa. Transp. Auth., 867 F. Supp. 288, 297 (E.D. Pa. 1994).

McCutchen asserts the following instances of harassment based upon race. At a staff meeting, George Tscheriawsky, plaintiff's former supervisor, accused the employees of stealing a credit card of another employee. (Pl. Dep. at 164-68.) The group of employees present comprised both African-American and white individuals. (Id.) Nevertheless, plaintiff asserts that there was a greater number of African-Americans, and that the implication was that Tscheriawsky was accusing them of being thieves. (Id.) Plaintiff further contends that Maiellano had sent a fax or email to some store managers on how to identify and be a good redneck. (Pl. Exh. Q, Maiellano Dep. at 105-06.) Additionally, plaintiff cites the formal complaint filed in December 1999 by a number of Sunoco employees alleging unfair labor practices and other discriminatory acts. (Pl. Exh. P.) I find that plaintiff has failed to support the allegations in the December 1999 complaint with specific alleged incidents, and that his failure to do so prevents the court from applying the conclusory allegations to meet the severe and pervasive standard. I further find that the alleged incidents involving Tscheriawsky and Maiellano were isolated and did not constitute severe or pervasive conditions. I conclude that plaintiff has failed to allege harassment that rises to the level of a racially hostile work environment. Thus, summary judgment will be granted to defendants on this claim.

2. *Racial Disparate Treatment*

McCutchen claims that he was subjected to racially disparate treatment by Sunoco's failure to promote him over his seven years of employment. Defendants contend that McCutchen's failure-to-promote claim must fail because he neither applied for a higher position nor expressed any interest in a promotion. Under the McDonnell Douglas test, a plaintiff must normally show that he applied for the position which he was denied in order to state a *prima facie* case of discrimination. See EEOC v. Metal Service Co., 892 F.2d 341, 347 (3d Cir. 1990). Nevertheless, the failure to formally apply for a job opening is not fatal to a claim of discriminatory hiring, "as long as the plaintiff made every reasonable attempt to convey his interest in the job to the employer." Id. at 348 (citing Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 365, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977) ("A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.") In the absence of a formal application, a plaintiff must show that he "did everything reasonably possible" to make his interest in the position known to defendants, that he "would have applied but for" defendant's discriminatory practices, or that he had a "real and genuine interest" in the position "but reasonably believed that a formal application would be futile." Newark Branch, NAACP v. Town of Harrison, 907 F.2d 1408, 1415 (3d Cir. 1990) (organization has no standing for disparate impact claim absent such showing) (citing Metal Service Co., 892 F.2d at 349, Teamsters, 431 U.S. at 367-38, Hailes v. United Air Lines, 464 F.2d 1006, 1008 (5th Cir. 1972)).

McCutchen testified that he believes he should have been promoted to the position of shift leader. (Pl. Exh. A at 155-58.) Nevertheless, he never expressed an interest in a promotion to defendants. (Id. at 157-58.) Simply pointing to the practice of Sunoco to not post job openings is insufficient to save McCutchen's claim. This argument is particularly insufficient in light of the fact that the shift leader positions to which he aspired was filled by an African

American male and a part African American female.[4] (Id. at 155-58; Def. Exh. T at 38.) I find that McCutchen has made no showing that he took measures to make his interest in a promotion known to defendants, that he would have applied but for defendants' discriminatory practices, or that he reasonably believed that expressing his interest in a promotion would have been futile. Additionally, with the exception of the shift leader position in the Walnut Street store, McCutchen has presented no evidence of other specific vacant positions for which he should have been considered. See Gourley v. Home Depot, C.A. No. 99-5728, 2001 U.S. Dist. LEXIS 9089, at **13-15 (E.D. Pa. June 29, 2001) (citing Amro v. Boeing Co.,, 232 F.3d 790, 797 (10th Cir. 2000); Reed v. Heil Co., 206 F.3d 1055, 1062 (11th Cir. 2000); Taylor v. Pepsi-Cola Co., 196 F.3d 1106, 1110 (10th Cir. 1999)). Accordingly, I conclude that plaintiff has failed to establish a *prima facie* claim of disparate treatment for failure to promote.

To the extent McCutchen asserts a disparate treatment claim with regard to the promotional and evaluation process of defendants, this too must fail. Plaintiff provides no evidence to show that similarly situated white employees were provided merit increases at a faster rate or that they were provided with evaluations more frequently than plaintiff. McCutchen may not rely upon unsupported assertions or conclusory allegations to survive summary judgment. Fireman's Ins. Co., 676 F.2d at 969. Because plaintiff has not shown that a genuine issue of material fact exists, summary judgment will be granted in favor of defendants on his disparate treatment claim.

3. Racial Disparate Impact

"A disparate impact violation is made out when an employer is shown to have used a specific employment practice, neutral on its face but causing a substantial adverse impact on a protected group, and which cannot be justified as serving a legitimate business goal of the employer." Metal Service Co., 892 F.2d at 346. Where plaintiff can show that "the elements of

[4] While plaintiff need not show that the position was filled by someone outside the protected class to state a *prima facie* discrimination claim, see Pivirotto v. Innovatice Sys., Inc., 191 F.3d 344, 354 (3d Cir. 1999), I find that McCutchen has failed to show circumstances that give rise to an inference of unlawful discrimination.

a respondent's decisionmaking process are not capable of separation of analysis, the decisionmaking process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2. McCutchen claims that Sunoco's policies with respect to merit increases, promotions and performance evaluations have a disparate impact upon the promotion and salary rates of African-American employees. McCutchen need not specify which specific policy within the subjective decisionmaking process with regard to the merit increases, promotions or performance evaluations lead to the disparate impact.

Nevertheless, McCutchen has not established a claim for disparate impact that he may assert. To have standing to bring a disparate impact claim challenging the promotion policy of defendants, plaintiff must show that he applied for a position and was rejected because of the employment policy at issue. See Newark Branch, NAACP, 907 F.2d at 1412-13 (citing Warth v. Seldin, 422 U.S. 490, 498-99, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975) (plaintiff must have suffered "some threatened or actual injury resulting from the putatively illegal action.")). In the absence of a formal application, McCutchen must show that he made reasonable efforts to express his interest in the position to defendants, that defendant's discriminatory practices deterred his application, or that he had reasonably believed that a formal application would be futile. Id. at 1414-16. As in his disparate treatment claim, I find that he has failed to make this showing. Consequently, I conclude that McCutchen has no standing to assert a claim of disparate impact with regard to the promotional practices of defendants.

With regard to the merit increases and performance evaluation policies, McCutchen has failed to provide the relevant statistical data required to prove a disparate impact claim. "Plaintiffs must [ ] present statistical evidence 'of a kind and degree sufficient to show that the practice in question has caused the [disparate impact] because of their membership in a protected group.'" Smith v. Xerox Corp., 196 F.3d 358, 365 (2d Cir. 1999) (quoting Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 994, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988)). McCutchen has submitted a chart outlining the pay history of sixteen Sunoco managers. Even assuming that a

pool of sixteen employees is sufficiently large enough to show a disparate impact of any statistical significance, see Massarsky v. General Motors Corp., 706 F.2d 111, 121 (3d Cir. 1983) ("An adverse effect on a single employee, or even a few employees, is not sufficient to establish disparate impact"), the charts completely fail to provide information regarding the pay history of employees at his level. Similarly, McCutchen has submitted no statistical evidence revealing any disparate impact on the evaluations of any employees of defendants. I conclude that McCutchen has not established that the merit increase and evaluation policies of defendants have resulted in a disparate impact on him as part of a protected class. Summary judgment on this claim will therefore be granted in favor of defendants.

4. Retaliation Claim

To establish a *prima facie* case of unlawful retaliation, a plaintiff must demonstrate that: (1) he or she engaged in activity protected by Title VII; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse employment action. See Weston v. Pennsylvania, 251 F.3d 420, 430 (3d Cir. 2001).

With respect to the first element, an employee does not need to prove that the conduct about which she is complaining is actually in violation of anti-discrimination laws; rather, he only has to have a good faith, reasonable belief that the complained of conduct was unlawful. See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996); Barber v. CSX Distribution Services, 68 F.3d 694, 701-02 (3d Cir. 1995) (holding that because letter complaint to human resources did not actually mention age discrimination, it could not constitute protected activity). It is undisputed that filing a charge with the EEOC constitutes protected activity under Title VII. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997).

With regard to the second element, "retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment" such that it constitutes an "adverse employment action." Robinson, 120 F.3d at 1300. The

United States Supreme Court has defined a tangible adverse employment action as a "'significant change in employment status, such as hiring, firing, failing to promote, reassignment, or a decision causing a significant change in benefits.'" Weston v. Pennsylvania, 251 F.3d 420, 431 (3d Cir. 2001) (quoting Burlington Indus. v. Ellerth, 524 U.S. 742, 749, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998)). McCutchen first contends that the continued failure of defendants to promote him constitutes an adverse employment action. As with his disparate treatment and disparate impact claims, because I find that McCutchen has failed to show that he applied for or expressed an interest in a promotion, I conclude that he cannot establish a *prima facie* retaliation claim based on any failure to promote. See Metal Service Co., 892 F.2d at 349; Newark Branch, NAACP, 907 F.2d at 1412-13. McCutchen also cites as adverse employment actions his evaluation in August 2001, wherein his supervisor filled out only the ratings portion and did not write in the individual appraisal areas, and the corresponding August 2001 raise of $.25 per hour that was below the mid-point pay range for sales associates. The August 2001 evaluation rated him as accomplished to outstanding. (Pl. Exh. G.) I find that neither an incomplete favorable evaluation nor a less than satisfactory raise constitute a significant change in employment status. I further find that McCutchen has not shown that he was subjected to an adverse employment action as a result of his filing of a charge with the EEOC. I therefore conclude that he has not shown that a genuine issue of material fact exists, and will grant summary judgment in favor of defendants on the retaliation claim.

C. ADA Claims

The ADA proscribes "discrimination against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). To state a cognizable cause of action for discrimination under the ADA, the plaintiff must show that (1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential

functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of the discrimination. Shaner v. Synthes (USA), 204 F.3d 494, 500 (3d Cir. 2000). ADA claims, like Title VII claims, are subject to the McDonnell Douglas burden-shifting analysis. See Lawrence v. Nat'l Westminster Bank, 98 F.3d 61, 68 (3d Cir. 1996) (ADA cases analyzed under Title VII burden-shifting rules).

1. *Disability under the ADA*

Defendants initially seek summary judgment on the first element, arguing that McCutchen is not "disabled" within the meaning of the ADA. Under the ADA, a "disability" is defined as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). A "physical impairment" is "any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neuorological, musculoskeletal, special sense organs . . . ." 29 C.F.R. § 1630.2(h)(1). "Seeing" is one of the major life activities. See 29 C.F.R. § 1630.2(i). The term "substantially limits" includes within its meaning "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(ii). Factors to be considered in determining whether an individual is substantially limited in a major life activity include the nature, severity, duration, and expected long term impact of the impairment. See 29 C.F.R. § 1630.2(j)(2).

McCutchen suffers from severe keratoconus,

> an eye disorder that arises when the middle of the cornea thins and gradually bulges outward, forming a rounded cone shape. This abnormal curvature changes the cornea's refractive power, producing moderate to severe distortion (astigmatism) and blurriness (near and farsightedness) of vision. These changes may also disrupt the normal, light-conducting arrangement of corneal protein, causing swelling and a sight-impairing scarring of the tissue.

Jackan v. New York State Department of Labor, C.A. No. 97-CV-0483, 1998 U. S. Dist. LEXIS 17202, at * 3 (N.D.N.Y. Oct. 26, 1998). Plaintiff underwent unsuccessful surgery between 1984 and 1985 for a corneal transplant in his left eye, and has completely lost any sight in that eye. (Pl. Exh. A at 20-23.) McCutchen continues to have severe keratoconus and corresponding limited visual acuity in his right eye. (Pl. Exh. D, May 8, 1999 Letter from P. Laibson, M.D. to R. Sando, M.D.; Pl. Exh. E, Nov. 30, 1999 Letter from R. Sando, M.D. to K. Seningen.) According to a letter written by one of McCutchen's physicians after a March 19, 1993 eye exam, if McCutchen used a "+20.00 +6.00 x105 aspheric" lens, his vision in his right eye would improve to 10/200.[5] (Pl. Exh. C, March 24, 1993 Letter from C. Aglow, O.D. to J. Antonacci.) Another treating physician observed that McCutchen's vision in his right eye is "very blurred." (Pl. Exh. E) While there is a possibility for plaintiff to attempt a cornea transplant in his right eye, the surgery runs the risk of another failure resulting in total blindness, and there is no indication that he will undergo surgery again. (Pl. Exh. D; Pl. Exh. A at 33.)

Defendants argue that because McCutchen stated in his deposition that his condition did not interfere with his daily activities, he cannot be considered to be substantially limited in his sight. This argument fails to take into consideration that a person who has suffered from a visual impairment for his entire life would adjust his daily activities so as to accommodate the impairment. For example, McCutchen avoids reading printed materials because he doesn't want to strain his eyes, and instead listens to books and newspapers on tape. (Pl. Exh. A at 36-37.) He is brought to work by SEPTA paratransit. (Id. at 36.) McCutchen can do his own grocery shopping by holding up the products close to his eyes to read the labels and by asking others in the store for help. (Id. at 38.) Another person goes to his house to assist him with bills and paperwork. (Id. at 35.) McCutchen does not watch television or go to the movies, but instead goes often to a theater that has a section for sight impaired patrons. (Id. at 37-39.) The fact that plaintiff can survive on his own does not by itself render him ineligible for relief under the ADA.

[5] McCutchen does not wear corrective lenses. (Pl. Exh. A at 20.)

The cases cited by defendant are not to the contrary; they instead hold that plaintiffs with vision problems do not suffer from substantially limiting impairments if they are still able to perform normal daily activities without difficulty. See, e.g., Bancale v. Cox Lumber Co., 97-113, 1998 U.S. Dist. LEXIS 22773, at **10-14 (M.D. Fla. May 18, 1998), aff'd 170 F.3d 199 (11th Cir. 1999) (legally blind plaintiff with double vision is not disabled under ADA where plaintiff could read and drive during daytime); Overturf v. Penn Ventilator, 929 F. Supp. 895, 897 (E.D. Pa. 1996) (plaintiff with tumor behind one eye causing double and triple vision is not disabled under ADA because plaintiff can drive, watch television and read).

I find that McCutchen has demonstrated his ability to prove at trial that his eye condition significantly restricts the acuity and manner in which he can see compared to the condition and manner in which the average person in the general population can see. I further find that McCutchen can prove that the blindness in his left eye and severe keratoconus in his right eye are physical impairments that substantially limit his ability to see. I therefore conclude that plaintiff has shown that he can prove he is "disabled" within the meaning of the ADA.

2. *Disparate Treatment*

McCutchen asserts that defendants discriminated against him on the basis of his disability by failing to promote him, by refusing to provide accommodation or the opportunity to perform certain duties, and by denying his workers' compensation claim.[6]

a. Failure to Promote

To state a prima facie case of discrimination in a failure to promote claim, in the absence of a formal application for the position, the plaintiff must show that he made "every reasonable attempt to convey his interest in the job to the employer." Metal Service Co., 892 F.2d at 348. As with his racial disparate treatment, disparate impact and retaliation claims for failure to promote, I find that McCutchen has failed to do so. Plaintiff contends that expressing an interest

[6] McCutchen does not put forward in his brief an argument of disparate treatment in pay raises or evaluations on the basis of his disability, nor sets forth any evidence that would support these claims.

in a promotion would have been futile in light of Maiellano's refusal to allow McCutchen work with the cash register or prepare food because of his disability. Nevertheless, Maiellano's staffing decisions do not constitute a "consistently enforced discriminatory policy." Teamsters, 431 U.S. at 365. I find that McCutchen has set forth insufficient evidence to support a reasonable belief that an application or expression of interest in a promotion to Sunoco management would have been futile. I therefore conclude McCutchen has failed to state a *prima facie* disparate treatment claim for failure to promote on the basis of his disability.

b. Failure to Accommodate

McCutchen also asserts that defendants refused to provide him with reasonable accommodation for his disability. Specifically, he claims that defendants failed to acquire a cash register that he could operate and did not allowing him to prepare food as part of his job duties. Discrimination under the ADA includes failing to make reasonable accommodations for a qualified person's disability. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999); 42 U.S.C. § 12112(b)(5)(A). Initially, I observe that it is questionable whether assigning plaintiff additional duties in operating a cash register and food preparation would constitute a "reasonable accommodation" under the statute. Nevertheless, assuming *arguendo* that the additional duties are accommodations, McCutchen still cannot succeed on this claim.

To state a *prima facie* claim, a plaintiff must point in the record to evidence that the employer was informed of both the disability and the employee's desire for accommodations for that disability. Id. at 313. It is generally the responsibility of the individual with a disability to inform the employer that an accommodation is needed. See 29 C.F.R. app. § 1630.9 (2001) (EEOC regulations relating to "reasonable accommodation"). McCutchen admitted that he never requested accommodations from defendants. (Pl. Exh. A at 138-39.) According to his performance evaluations, McCutchen was clearly able to handle the job duties assigned to him without accommodation. (Pl. Exh. B.) Plaintiff has provided no evidence to show that defendants knew of his desire to operate a visually-handicapped accessible cash register or to

take part in the food preparation. As McCutchen was capable of performing his assigned duties, the sheer fact that he was visually impaired by itself did not constitute notice to his employer that an accommodation was needed. I find that McCutchen has not shown that he provided notice to defendants of his need for an accommodation. I therefore conclude that McCutchen has failed to meet his burden to establish that he can present at trial a *prima facie* claim for failure to accommodate.

c. Denial of Workers' Compensation Claims

McCutchen further asserts a disability discrimination claim based upon the denial of his workers' compensation claims. He filed a workers' compensation claim on May 3, 1999 ("May claim") and on October 29, 1999 ("October claim") in connection with two injuries that occurred to his right eye. Plaintiff contends that he encountered unnecessary delays and derogatory comments from Sunoco's insurance department representative when attempting to resolve his May claim. (Pl. Exh. A at 97-102.) The May claim was eventually approved, and McCutchen's medical expenses were covered by defendants' workers' compensation carrier two months after the injury took place. (Pl. Exh. A at 97, 100-01.) However, McCutchen's October claim was denied by defendant's workers' compensation carrier. (Pl. Exh. L.) The time that he had taken off to recuperate, between October 20, 1999, to November 1, 1999, was taken out of his sick leave. (Pl. Exh. A at 117-18.)

To establish a disparate treatment claim, plaintiff must show that he has suffered an otherwise adverse employment decision as a result of the discrimination. See Shaner, 204 F.3d at 500. An "adverse employment action is one which is "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." Cardenas v. Massey, 269 F.3d 251, 263 (3d Cir. 2001). McCutchen has cited no cases in which the denial of a workers' compensation claim was construed as an adverse employment action. Even were the Court to accept this argument, however, McCutchen still cannot survive this motion for summary judgment on this claim. Because the May claim was resolved in plaintiff's favor, it cannot

constitute an adverse employment action. Neither the delay in resolution nor insensitive comments that the insurance department may have spoken constitute an adverse employment action.

Furthermore, defendants correctly argue that McCutchen has failed to establish that the reason behind the denial of his October claim was pretextual. In order to prove pretext, the plaintiff must provide either direct or circumstantial evidence from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons or (2) believe that a discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. See Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994) (citations omitted). In order to prove this, the plaintiff "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.'" Fuentes, 32 F.3d at 765 (quoting Ezold, 983 F.2d at 531). "[T]he plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." Id.

Defendants assert that the denial of McCutchen's workers' compensation claim was based on inconsistent accounts of the cause of his injury given to the company and to the doctor. (Def. Exh. N at 71, 76.) Specifically, McCutchen informed the company that something flew into his eye when he was taking out the trash, but told the doctor that he had bumped his eye into an object while at work. (Id. at 71.) Consequently, the claim was denied because defendants were unable to confirm that the injury was job-related. (Id. at 65.) Regardless of whether the determination was incorrect, the burden of persuasion is on McCutchen to show that the decision was motivated by discrimination. I find that he has not now and cannot meet this burden at trial. I therefore conclude that summary judgment will be granted in favor of defendants on this claim.

3. *Hostile Work Environment*

A plaintiff seeking to state a claim for harassment under the ADA must make the following showing: (1) the plaintiff is a qualified individual with a disability under the ADA; (2) plaintiff was subject to unwelcome harassment; (3) the harassment was based on the plaintiff's disability or a request for an accommodation; (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) that defendants knew or should have known of the harassment and failed to take prompt, effective remedial action. Walton v. Mental Health Ass'n, 168 F.3d 661 (3d Cir. 1999) (assuming without deciding existence of hostile work environment cause of action under ADA for purposes of analysis).

a. Severe and Pervasive Harassment

Defendants move for summary judgment based on McCutchen's failure to show that the harassment was sufficiently severe or pervasive so as to alter the conditions of employment. In determining the "severe and pervasive" standard, courts must consider "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Faragher v. City of Boca Raton, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (citations omitted).

McCutchen contends that Maiellano cut the number of hours that McCutchen worked down from 40 hours per week to between 33 and 34 hours per week, and that his hours did not return to 40 per week until after Maiellano left the store. (Pl. Exh. A at 81-83.) Additionally, plaintiff testified that Maiellano changed plaintiff's schedule in a manner that interfered with plaintiff's regularly scheduled eye doctor appointments. (Id. at 190-91.) Maiellano informed McCutchen that he would need to take a vacation day if he needed to see the doctor. (Id.) To state a hostile work environment claim, plaintiff must show that the harassment was caused by a discriminatory animus. See Walton, 168 F.3d at 667. McCutchen admits that the hours of his

fellow employees were similarly cut, and that the defendant store was under a budget for the total number of hours it could assign its employees. (Pl. Exh. A at 84-85.) He has adduced no facts that show that defendants reduced McCutchen's hours nor rearranged his work schedule because of his disability. Thus, these actions do not constitute a basis for a hostile work environment claim as a matter of law.

McCutchen further cites numerous incidents of derogatory comments, made after his transfer to the Walnut Street Store in late 1997 until he filed his EEOC charge in May of 2000, that he believes were examples of harassment. McCutchen recounts three occasions on which Maiellano commented that plaintiff was "useless." The first instance was when Maiellano instructed the former general manager of the store to cut McCutchen's hours. (Id. at 83.) The second instance was when Maiellano complained to Tammy Green, a manager, about the condition of the gas pumps. (Id. at 150, 152) Maiellano further commented to McCutchen that he didn't have to see them, he could just "feel it and wipe it down." (Id.) The third instance involved Maiellano instructing Ivan Vynnyk, the store manager, to have McCutchen wash the poles next to the trash cans outside, again stating that plaintiff didn't have to see, he merely needed to feel around and wipe it down. (Id. at 152-53.)

On another occasion, Maiellano kicked some cans in the parking lot and said to McCutchen, "okay, you can see that. Go on over there and pick it up." (Id. at 151.) Maiellano further remarked to another manager that McCutchen's hours didn't "count." (Id. at 191.) In addition, on one occasion, when plaintiff was looking at a book with pictures, Greg McFadden, a former manager of the Walnut Street store, commented, "for a guy that can't see you know how to look in a book." (Id. at 154.) Finally, McCutchen criticizes the persistent decision of defendants to forego assigning job duties to plaintiff that other sales associates handle, such as cash register operation and food preparation, based on their belief that he could not manage them because of his disability.

To survive summary judgment, plaintiff would have to show that severe or pervasive

harassment altered the conditions of his employment and created an abusive working environment from both a subjective and objective standpoint. See Presta v. SEPTA, No. 97-2338, 1998 U.S. Dist. LEXIS 8630, at *40-41 (E.D. Pa. June 11, 1998). "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270-71, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (quoting Faragher, 524 U.S. at 788). McCutchen has testified to a handful of isolated insensitive comments and unfair work distribution over several years of employment, rather than abusive conduct. In light of the unskilled nature of the duties of plaintiff's job, rather rough hewn comments about his work skills, even if they refer to a visual impairment well-known to both parties, are not evidence of discrimination, harassment, or retaliation. I find that the cited incidents and complaint of his job assignments do not rise to the level of severe and pervasive harassment. I conclude that McCutchen has failed to produce sufficient evidence to demonstrate a genuine issue of material fact as to whether he was subjected to a hostile work environment, and will therefore grant summary judgment to defendants on this claim.

D. Intentional Infliction of Emotional Distress Claim

The Supreme Court of Pennsylvania has stated that "'it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress.'" Hoy v. Angelone, 554 Pa. 134, 152, 720 A.2d 745, 755 (1998) (quoting Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988)). Harassment alone does not rise to the level of outrageousness required to sustain a claim of intentional infliction of emotional distress. See id. "'[T]he only instances in which courts applying Pennsylvania law have found conduct outrageous in the employment context is where an employer engaged in both [ ] harassment and other retaliatory behavior against an employee.'" Id. For the reasons set forth above, McCutchen has failed to establish that defendants retaliated against him. I find that McCutchen's evidence as to the conduct of

defendants thus does not begin to approach this standard of outrageousness. Plaintiff cannot survive a motion for summary judgment on this tort claim under state law.

IV. Conclusion

This Court concludes that pursuant to Federal Rule of Civil Procedure 56(c), plaintiff has failed to show that a genuine issue of material fact exists as to his racial disparate treatment, racial disparate impact, racial hostile work environment, retaliation, disability disparate treatment, disability hostile work environment and intentional infliction of emotional distress claims. Thus, none of his claims survive the motion of defendants for summary judgment as a matter of law.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN McCUTCHEN,	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	
SUNOCO, INC., et al.	:	
Defendants.	:	**NO. 01-2788**

O R D E R

AND NOW this 16th day of August, 2002, upon consideration of the motion of defendants Sunoco, Inc , Mascot Petroleum Company, Inc., and Louis Maiellano (collectively, "Sunoco") for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure (Document No. 17), the response of plaintiff John McCutchen ("McCutchen") (Document No. 20) and the reply thereto (Document No. 21), and the pleadings, depositions, answers to interrogatories, admissions on file and affidavits of record, and having concluded, for the reasons set forth in the foregoing memorandum, that there exist no genuine issues of material fact and that defendants are entitled to judgment as a matter of law, it is hereby **ORDERED** that:

1. The motion of defendants for leave to reply (Document No. 21) is **GRANTED**;
2. The motion for summary judgment is hereby **GRANTED** in favor of defendants on all counts.

It is **FURTHER ORDERED** that**JUDGMENT** is entered in favor of defendants Sunoco, Inc., Mascot Petroleum Company, Inc., and Louis Maiellano and against John McCutchen.

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LOWELL A. REED, JR., S.J.